SUPREME COURT, U. S.

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In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 779

WILLIE GRAY GARRISON,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

QUESTIONS PRESENTED FOR REVIEW

Whether a defendant, indicted by and tried before State grand and petit juries from which women were by State statutes excluded, was denied his rights under the due process clauses of the Fifth and Fourteenth Amendments and of his right under the Fourteenth Amendment to the equal protection of the laws as guaranteed him by the Constitution of the United States.

Whether if the denial of these rights, which have not been previously recognized and declared, be found, the actual exercise of these newly declared rights be delayed for a reasonable time, in consideration of practical problems incident to their implementation.

ARGUMENT

In his prayer that this Honorable Court issue a writ of certiorari to review the judgment of the Court of Appeals of the State of Alabama entered in this case March 12, 1968, Petitioner relies solely on the case of *Ballard vs. United States*, 329 U.S. 187, 67 S. Ct. 261, 91 L. Ed. 181, decided by this Honorable Court December 9, 1946.

The judgment of the Court of Appeals was to the effect that the State trial court, in which Petitioner was criminally prosecuted, did not commit reversible error by denying Petitioner's motions to quash the venire because of the systematic exclusion of women from the grand and petit juries. Such exclusion was then in accord with and pursuant to State statutes. (See Appendix for statutes).

Petitioner contends that this systematic, statutory exclusion of women from the grand and petit juries operated to deny to him his rights under the due process clauses of the Fifth and Fourteenth Amendments and the equal protection clause under the Fourteenth Amendment, as guaranteed him by the Constitution of the United States.

At the outset Respondent respectfully submits that the *Ballard* case, *supra*, is inapplicable to the instant case on two grounds. First, that case was concerned only with the proper selection of Federal juries, whereas the instant case involves only State juries, and secondly, that case was concerned with the lawful method of selecting Federal juries, as prescribed by Congress and did not consider any Constitutional criterion.

The case merely determined the Congressional criterion for selecting jurors in Federal Courts as set out in the then in effect USCA §§411 and 412. These sections, in substance, provided that the qualifications for jurors in a Federal Court be the same as those set out for State jurors by the law of the State in which the Federal Court sat.

The decision went only so far as to say that where the law of the State in which a Federal Court sat did not disqualify women from State jury service, the systematic exclusion of women from Federal jury service would be ". . . a departure from the scheme of jury selection which Congress adopted . . . " (*Ballard*, 329 U.S. at p. 193).

Respondent wishes to emphasize that the *Ballard* case in no way intimated that the systematic exclusion of women even by a Federal Court sitting in a State which qualified them to serve on juries would be violative of the Constitution. [In accord see *Chance v. U. S.*, 322 F. 2d 201, CCA 5 (1963) at p. 204.] Exclusion, in such case, would be " . . . in disregard of the *prescribed standards* of jury selection." (329 U.S. at p. 195). It would " . . . deprive(s) the jury system of the broad base it was designed by *Congress* to have . . . " (329 U.S. at p. 195). It would be " . . . a departure from the *statutory scheme*." (329 U.S. at p. 195). It would be a denial to the defendant of the type of jury " . . . the *lawmakers* have not seen fit to withold from, but have actually guaranteed to him." (329 U.S. at p. 195). [Emphases added].

The Court concluded that since women had been systematically excluded from both the petit and grand juries of a Federal Court sitting in a State where they were not disqualified from State jury service, it had to dismiss the indictment rather than merely remand the cause for a new trial, for " . . . the indictment was not returned in accordance with the procedure established by *Congress*." (329 U.S. at p. 196). [Emphasis added].

In the case of *Hoyt v. Florida*, 368 U.S. 57, 82 S. Ct. 159, 7 L. Ed. 2d 118, decided by this Honorable Court November 20, 1961, Appellant, a woman, contended that her trial and conviction for second degree murder by an all male State jury violated her right to an impartial trial under the Fourteenth Amendment because the all male State jury was the operative effect of a State statute which exempted women

from State jury service unless they voluntarily registered for such. In other words, she contended that this exemption and voluntary registration procedure operationally effectuated the unconstitutional exclusion of women from the State jury, thereby rendering her trial unconstitutional.

This Honorable Court did at some length discuss the operation of this procedure to show that it was based on a reasonable classification and did not operate to the arbitrary, systematic exclusion of women from the State's juries. But, Respondent submits, this discussion was based on the supposition that the constitutionality of a State's confining its jury duties to males, was still open to question.

Prefacing this discussion the Court said:

"We need not, however, accept appellant's invitation to canvass in this case the continuing validity of this Court's dictum in *Strauder v. West Virginia*, 100 U. S. 202, 210, 25 L. Ed. 664, 666, to the effect that a State may constitutionally 'confine' jury duty 'to males.' This constitutional proposition has gone unquestioned for more than eighty years in the decisions of the Court, (citation omitted), and had been reflected, until 1957, in congressional policy respecting jury service in the federal courts themselves. *Even were it to be assumed that this question is still open to debate,* the present case tenders narrower issues." (368 U.S. at p. 60). [Emphasis added].

From this quoted portion of the *Hoyt* opinion, Respondent cannot but conclude that at least as late as November 20, 1961, when *Hoyt* was decided, this Honorable Court did not deem the confinement of State jury service by State law to men, therefore, excluding women, to be unconstitutional so as to subject an all-male State jury resulting from such confinement to attack on constitutional grounds by a defendant tried by such jury.

The latest decision of which Respondent is aware concerned with the constitutionality of State law excluding

women from State jury service was that handed down by the three judge Federal District Court in *White v. Crook*, D. C. 251 F. Supp. 401, decided February 7, 1966. The Court in *White, supra*, did find that the statutory exclusion of women by a State from State jury service did violate the Constitutional right to equal protection under the law, as guaranteed by the Fourteenth Amendment, but *of women plaintiffs who sought to assert their right and the right of all others similarly situated to sit on State juries.* The opinion did not even suggest that the exclusion would deny the Fourteenth Amendment's guarantee to a defendant tried before such a statutory all male jury.

Even with regard to the women seeking the right to sit on State juries, whose exclusion was found to be arbitrary, therefore unconstitutional, " . . . in view of modern political, social and economic conditions . . . " (251 F. Supp. at p. 408), the Court determined that public policy would be best served if such finding would be only prospective in application, and [such finding] " . . . shall have no retroactive effect." (251 F. Supp. at p. 409). The reason given for this determination was that, " . . . this Court is fully aware that the Alabama statute [which excluded women from jury lists] has been regarded and relied upon as constitutional by all alike." (251 F. Supp. at p. 409).

The Court then *specifically* declared that, for the future commencing not later than June 1, 1967, women have a right not to be excluded from jury service in Alabama courts. (251 F. Supp. at pp. 409-410).

Respondent wishes to point out that the Alabama statutes excluding women from jury service were amended September 12, 1966, in compliance with *White vs. Crook, supra.* [See Appendix A for the statutes and Appendix B for the Acts amending such]. These Acts became effective September 12, 1966, almost nine months earlier than the June 1, 1967, deadline ordered in *White vs. Crook, supra.* Petitioner's case was

tried April 13, 1966, and concluded April 15, 1966, almost five months before the amending Acts became effective.

Since there has been no holding by this Honorable Court that an all-male State jury, whether grand or petit, from which women were excluded would operate to deny to a defendant, indicted or tried by such, any Constitutional rights; Since with regard to women's rights to sit on juries in Alabama courts, Acts including them on Alabama juries and amending the statutes which excluded them were passed in compliance with the Federal District Court's order; Since Petitioner's indictment was returned and trial was had before the amending Acts went into effect, Respondent respectfully urges that Petitioner was not deprived of any Constitutional rights in the State trial court and the Judgment of the Alabama Court of Appeals is without error.

However, Respondent urges that if this Honorable Court, now, finds that a defendant, indicted and tried before all-male State grand and petit juries from which women were statutorily excluded, would be deprived of rights guaranteed him by the Fifth and Fourteenth Amendments to the Constitution of the United States, such finding be given retroactive effect in this case to a point in time not earlier than June 1, 1967. Such limited retroactive effect would recognize the State's good faith reliance on and compliance with a Federal District Court's order. Such limited retroactive effect would be consistent with *Brown vs. Board of Education,* 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, and 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, wherein it was held that it is not uncommon for courts, when declaring constitutional rights, not previously recognized and declared, to delay for a reasonable time, in consideration of practical problems incident to an implementation of those rights, the actual exercise of the newly declared rights. [See also *Sims vs. Frink,* D.C., 208 F. Supp. 431, aff'd *Reynolds vs. Sims,* 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506.]

CONCLUSION

Based on the foregoing argument, Respondent submits that Petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert P. Bradley, one of the attorneys for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of December 1968, I served a copy of the foregoing brief upon Honorable Roscoe B. Hogan, Attorney for Petitioner, 1203 City Federal Building, Birmingham, Alabama 35203, by depositing the same in the United States mail, first class postage prepaid, and properly addressed to him at the address given.

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APPENDIX A

Title 30, §20, Code of Alabama 1940, Recompiled 1958:

"§20. The jury commission shall meet in the court house at the county seat of the several counties annually, between the first day of August and the twentieth day of December, and shall make in a well bound book a roll containing the name of every male citizen living in the county who possessed the qualifications herein prescribed and who is not exempted by law from serving on juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the jury commission shall cause to be written on the roll opposite every name placed thereon the occupation, residence and place of business of every person selected, and if the residence has a street number it must be given. Upon the completion of the roll the jury commission shall cause to be prepared plain white cards all of the same size and texture and shall have written or printed on the cards the name, occupation, place of residence and place of business of the person whose name has been placed on the jury roll; writing or printing but one person's name, occupation, place of residence and of business on each card. These cards shall be placed in a substantial metal box provided with a lock and two keys, which box shall be kept in a safe or vault in the office of the probate judge, and if there be none in that office, the jury commission shall deposit it in any safe or vault in the court house to be designated on the minutes of the commission; and one of said keys thereof shall be kept by the president of the jury commission. The other of said keys shall be kept by a judge of a court of record having juries, other than probate or circuit court, and in counties having no such court then by the judge of the circuit court, for the sole use of the judges of the courts of said county needing jurors. The jury roll shall be kept securely and for the use of the jury commission exclusively. It shall not be inspected by anyone except the members of the

commission or by the clerk of the commission upon the authority of the commission, unless under an order of the judge of the circuit court or other court of record having jurisdiction."

Title 30, §21, Code of Alabama 1940, Recompiled 1958:

"§21. The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty-five years shall be required to serve on a jury or to remain on the panel of jurors unless he is willing to do so."

APPENDIX B

Act No. 284, Acts of Alabama, Special Session, 1966, p. 427, §1. Approved September 12, 1966:

"Section 1. In all counties in this State in which the jury board was established and its duties prescribed by a special or local law or in which the qualification of jurors or the procedure for preparation of the jury rolls and the filling and refilling of jury boxes has been prescribed by local or special law, the names of female citizens of the county, possessing like qualifications to those qualifications prescribed in such laws for male jurors shall be listed and in all things handled and treated in the same manner prescribed for the listing, handling and treating of the

names of male citizens of such counties to the end that both men and women shall be subject to jury duty under like conditions; and their names put on the jury roll and in the jury box without regard to sex."

Act No. 285, Acts of Alabama, Special Session, 1966, p. 428, §3. Approved September 12, 1966:

"Section 3. Section 20, Title 30, Code of Alabama 1940, as amended, is amended further to read as follows:

" ' Section 20. The jury commission shall meet in the court house at the county seat of the several counties annually, between the first day of August and the twentieth day of December, and shall make in a well bound book a roll containing the name of every citizen living in the county who possesses the qualifications herein prescribed and who is not exempted by law from serving on juries. The roll shall be arranged alphabetically and by precincts in their numerical order and the jury commission shall cause to be written on the roll opposite every name placed thereon the occupation, residence and place of business on each card. These cards shall be placed in a substantial metal box provided with a lock and two keys, which box shall be kept in a safe or vault in the office of the probate judge, and if there be none in that office, the jury commission shall deposit it in any safe or vault in the court house to be designated on the minutes of the commission; and one of said keys thereof shall be kept by the president of the jury commission. The other of said keys shall be kept by a judge of a court of record having juries, other than the probate or circuit court, and in counties having no such court then by the judge of the circuit court for the sole use of the judges of the courts of said county needing jurors. The jury roll shall be kept securely and for the use of the jury commission exclusively. It shall not be inspected by any one except the members of the commission or by the clerk of commission upon the authority of the commission,